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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1134

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,

Respondents.

KEN F. MANS, individually and on behalf of all persons employed by Sunray D-X Oil Company and Sun Oil Company as of the date of merger of these two companies,

Petitioners,

v.

SUNRAY D-X OIL COMPANY and SUN OIL COMPANY,

Respondents.

DEL JEANNENE JOBE individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical, and the employees of Amerada Hess Corporation,

Petitioners,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' REPLY BRIEF

This reply brief serves the dual purpose of calling attention to material not available to Petitioners when the original petition was filed; and of responding to the briefs filed by the Respondents.

I. Supplemental Material

Since the initial petition was filed in this case, much has transpired to magnify the national importance of the issues involved. President Nixon, in announcing cuts in federally funded social programs, declared that he is "irrevocably committed . . . to fulfilling the American dream for all Americans." He stated that he was not so much interested in "simply a system of government helping people," but rather one "under which government helps poor people to help themselves and one another." Tulsa Daily World, March 2, 1973, p. 2A, col. 5. This represents the very foundation of the federal antitrust laws. In passing the Celler-Kefauver Act, Congress observed that economic power concentrated in the hands of private persons would necessarily lead "to big bureaus of the Government." H.R. Rep. 1191, 81st Cong., 1st Sess. 13 (1949). Much the same was said in the earlier report issued by the Temporary National Economic Committee. (Temporary National Economic Committee, Investigation of Concentration of Economic Power, S.Doc. 35, 77th Cong., 1st Sess. (1940) (hereinafter referred to as the TNEC Report).)

The American dream, recently reaffirmed by President Nixon and staunchly defended by Congress through the antitrust laws, is a simple principle of liberty and justice for all. Abraham Lincoln best explained this cherished liberty when, in his reverent Gettysburg address, he stated: "our fathers brought forth on this continent a new nation, conceived in Liberty and dedicated to the proposition that all men are created equal." Lincoln spoke of a great civil war that was testing whether this Nation could long endure, and he stated:

> "that we here highly resolve that these dead shall not have died in vain . . . that this nation, under God, shall

> have a new birth of freedom . . . and that government of the people, by the people, for the people, shall not perish from the earth."

Exercising absolute control over the lives of employees who dedicated years of work, Atlantic Richfield, Sun Oil Company, and Amerada Hess would change the words of Lincoln to read: government of corporations, by corporations, and for corporations. But Congress, seeking a more vigorous antitrust enforcement policy, stated that corporations were created only as an instrument to serve the people.

> "If the political structure is designed to preserve the freedom of the individual, the economic structure must not be permitted to destroy it." TNEC Report at 5.

Because the people have not been willing to stand up to demand that big corporations comply with the antitrust laws, the American dream is being destroyed. This was predicted by Congress when we were warned that unless the trend toward economic concentration was stopped, the people would find themselves under authoritative corporate control. In 1941, Congress observed:

> "It is quite conceivable that the democracies might attain a military victory over the aggressors (World War II) only to find themselves under the domination of economic authority far more concentrated and influential than that which existed prior to the War." TNEC Report at 3.

Mr. Justice Harlan had earlier noted in *Standard Oil Co.* v. *United States,* 221 U.S. 1, 83 (1911) (concurring and dissenting opinion) that the people of this Country were being committed to slavery "from aggregations of capital." Unless the trend toward economic concentration was reversed, there was a fear that "the opportunity of those in-

dividuals who will constitute the next generation will be completely foreclosed." TNEC Report at 9.

All of these fears have become a reality according to a report, "Work In America", recently released by the Secretary of the Department of Health, Education, and Welfare. Although corporate mergers and economic concentration was not singled out, the HEW Task Force observed:

> "Our economic, political, and cultural system has fostered the notion of independence and autonomy, a part of which is the belief that a hardworking person, even if he has little capital, can always make a go of it in business for himself. Or, to put it another way, if things get too bad in a dependent work situation, it has been felt that the individual could always strike out on his own.
>
> "This element of the American Dream is rapidly becoming myth, and disappearing with it is the possibility of realizing the character traits of independence and autonomy by going into business for oneself." Report of a Special Task Force to the Secretary of Health, Education, and Welfare, Work In America, 20-21 (MIT Press ed. 1973).

Under the great American dream, a man was free to work as an employee, but he was also free to strike out on his own. He was free to go into his own business and compete with his ex-employer. This was possible under the economic concepts envisioned by Congress when the antitrust laws were enacted. The basic assumption drawn from the history of all antitrust statutes was to:

> "Perpetuate and preserve, for its own sake, and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."

United States v. *Aluminum Company of America*, 148 F.2d 416, 429 (2d Cir. 1945).

Corporate mergers are converting this Nation and its economy into a system of big business, big labor and big government. As found by the HEW Task Force.

> "the trend is toward large corporations and bureaucracies which typically organize work in such a way as to minimize the independence of the workers and maximize control and predictability for the organization."
>
> "Work In America", at 21.

It was found that: "Self employed persons dropped from 18% in 1950 to 9% in 1971"; and 90% of our employed people in 1970 were wage and salary workers. *Id.* at 21.

Corporations have not been content with the trend that will soon make all our people wage earners. In an effort to guard against future competition, corporations require certain employees to sign agreements not to compete. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 24 Cal. App. 3d 35, 100 Cal. Reptr. 791 (1972), cert. granted 93 S. Ct. 96 (1973). Denied the right to enter his own business; destined only to be an employee; employed only by the arbitrary will of the corporation rather than by the forces of free competition; victimized by corporate antitrust violations; AND NOW DENIED STANDING IN THE COURTS . . . what is left for American workers? The HEW Task Force answers this question with a conclusion that "either the absence of work or employment in meaningless work is creating an increasingly intolerable situation." "Work In America" at 186. The squandering of human life is the direct result of corporate mergers.

One of the most significant findings of the HEW Task Force involved the anxieties, frustrations and alienation of

American workers. A principal cause of these feelings, experienced by blue-collar workers, white-collar workers, and middle management, involved the impersonal nature of jobs. Corporations have grown so large that the individual employee has lost his identity. Based upon the total findings of the HEW Report on "Work In America", it is not difficult to understand the most serious and alarming Gallup Poll, recently released, that revealed that 11% of Americans would go to settle in another country if they were free to do so. (The Tulsa Tribune, Feb. 26, 1973, p. 13A, col. 3).

According to this Gallup Survey, 14% of those persons with a college background would leave the United States; and 19% of those persons under 30 years of age would leave. In a country founded upon the sacred principles of liberty and justice for all, it is appalling to think that 1/5th of country's young people would leave to settle in foreign lands. Perhaps the answer lies in the possibility that we no longer have the freedom and opportunities that our founding fathers sought when they settled this great land. Instead of freedom and opportunity, our people live under the authoritative control of big corporations that have, in the name of efficiency, grown into mighty empires through illegal corporate mergers. As President Roosevelt stated to Congress: "Industrial efficiency does not have to mean industrial empire building." TNEC Report at 13.

A brief summary of the findings of the HEW Task Force will clearly demonstrate the national importance of the issues in this case, and why this Court should grant the Writ requested.

1. *Elderly workers*: There was found to be a direct relationship between work and health. Many workers forced into retirement begin a rapid de-

terioration. It was also found that: "Some workers are victimized by such sinister practices as being fired just before they are eligible to receive benefits or through hanky-panky played with *pension funds in mergers*, as well as by mismanagement, bankruptcies, and the like." "Work In America" at 72 (Emphasis added).

2. *Blue-collar workers*: It was found that blue-collar workers no longer believe "that there is a great deal of opportunity to move up the ladder of success." *Id.* at 32. Interviews conducted by the HEW Task Force revealed an "almost overwhelming sense of inferiority" among blue-collar workers. *Id.* at 35.

3. *White-collar workers*: White-collar workers, "once grateful for having been spared the dehumanization of the factory" (*Id.* at 38), suffer the same alienation experienced by blue-collar workers. It was found that the size of corporate organizations has imparted "to the clerical worker the same impersonality that the blue-collar worker experiences in the factory." *Id.* at 38.

4. *Middle-management*: Much middle management discontent was also found by the HEW Task Force. "A general feeling of obsolescence appears to overtake middle managers when they reach their late 30's. Their careers appear to have reached a plateau, and they realize that life from here on will be along an inevitable decline." *Id.* at 41.

5. *Young workers*: It was found that young people are rejecting the authoritative control of corporate bureaucracy, but they have not rejected the value of work. *Id.* at 47. "The young worker is in revolt

not against work but against the authoritarian system developed by industrial engineers who felt that 'the worker was stupid, overly emotional . . . insecure and afraid of responsibility'." *Id.* at 50.

6. *Minority workers*: Minority workers and their families are even more serious casualties of the work system. "One out of three minority workers is unemployed, irregularly employed, or has given up looking for a job." *Id.* at 51. The most immediate need of minority workers is for a job that pays enough to support himself and his family. *Id.* at 51.

All people need work for economic and psychological reasons. "To be denied work is to be denied far more than the things that paid work buys; it is to be denied the ability to define and respect one's self." *Id.* at 8. " 'Without work all life goes rotten. But when work is soulless, life stifles and dies.' " *Id.* at 186. *The HEW Report on "Work In America" is a reflection of all the fears earlier expressed by Congress as the antitrust laws were debated and passed. These are the same reasons that clearly show that Congress intended that "employees" be included in the term "business or property" of Section 4 of the Clayton Act.*

In the Clayton Act debates, Congressman Casey observed that "business" is: "That which occupies time, attention, and labor of men for the purpose of livelihood or profit; that which occupies the time, attention and labor of man for the purpose of profit and improvement." 51 Cong. Rec. 9559 (1914). Congressman Casey further stated that "business" was: "That which busies or that which occupies the time, attention, or labor of one as his principal concern . . ." 51 Cong. Rec. 9559 (1914). Offering an explanation of these definitions, Congressman Casey stated:

"It will be seen from the definitions that while there is a fundamental difference between property and business there is none at all between business and labor . . ." 51 Cong. Rec. 9559 (1914).

II. Reply to Respondents

As concluded by the HEW Task Force, American workers are caught between problems of unemployment and problems of inflation. "Work In America" at 153. When the government creates a large number of jobs to relieve the pain of unemployment, there is an inflationary trend that takes money out of the pockets of all. But the fact is that corporate mergers and the resulting increases in economic concentration contribute greatly to unemployment and inflation.

Competition is the most effective tool to create jobs and to stop inflation. Hearings Before the Senate Subcommittee on Antitrust and Monopoly on Economic Concentration, S.Doc. 191, 89th Cong., 2d Sess. p. 1863 (1966). In the petroleum industry, experiencing one of the fastest merger trends, the major companies have gained control of crude oil production and refining. (For the list of oil company mergers see Atlantic Appendix pp. 72-77.) Through corporate mergers, these companies have eliminated many jobs; have substantially reduced domestic crude oil production; and have created a market with highly stabilized prices. What the oil companies were not allowed to do by this Court in *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940), they have been able to accomplish through corporate mergers. Employees have been the ones who have suffered the most from the elimination of competition in this critical industry.

A. Response to Atlantic Richfield

1. Employees have a definite interest and concern in the business of their employer and they are direct participants in the economic market of their employer.

In its brief in opposition, Atlantic asserts and seeks to defend the conclusion that Reibert had no interest in the business of Sinclair. (Atlantic's Brief in Opposition p. 3). This insensitive and impersonal corporation attitude toward employees, many of whom have devoted their lives and have worked hard for an expected pension and security, is a good illustration of the employee frustration and alienation found and reported by HEW in "Work in America."

The simple fact is that employees *are* Atlantic Richfield or Sinclair. There may be capital paid in by shareholders; nevertheless, there is no life in a corporate structure except through employees. There is no competition in the market place except through the action of employees. Atlantic and other giant oil companies explore and produce oil; research for new methods of production; and refine and market products only through employees. Abraham Lincoln recognized this superiority of labor over investment when in his annual message to Congress on December 3, 1861, he stated: "Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration." *V. Basler,* "The Collected Works of Abraham Lincoln", 52 (1953), as cited by Justice Douglas in *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U.S. 169, 186 (1961) (dissenting opinion).

2. Employees terminated by reason of an illegal corporate merger are injured by reason of an antitrust violation.

Atlantic, by citing cases from all circuits (a list covering three pages of the brief in opposition), seeks to discredit the importance of the issue presented to this Court. Although the cases relied on by Atlantic (Atlantic's Brief in Opposition pp. 5-7), bear no resemblance to the facts in the present case, they are cited and listed in an effort to make the claim of the injured employees appear frivolous and unimportant. The Tenth Circuit's holding was described as a "routine application of the well-established antitrust standing rule." (Atlantic's Brief in Opposition p. 14).

If Atlantic actually considers the employee claim to be frivolous and unimportant, it is difficult to understand why it took the lower courts such a long time to resolve the issue. The plaintiffs have vigorously prosecuted their claims in the lower courts for approximately four years and as of today the issue of standing, the most preliminary question, has not been finally resolved. This would indicate that the issue was not even clear to the lower courts.

The cases relied on by Atlantic relate to the undisputed issue of causation. There is no dispute about the requirement that the employees must prove that their injury resulted from an antitrust violation. This is as required by Sections 4 and 16 of the Clayton Act. *The real issue is from what act or event is this causation measured?*

Atlantic seeks to confuse the issue of proximate cause by contending that causal connection is measured from the anti-competitive effects or the "lessening of competition." It is contended by the employees that causal connection can only be measured from the merger. Section

4 of the Clayton Act grants standing to any person injured in his business or property by reason of *anything forbidden* in the antitrust laws. It is conceded by Atlantic and the lower court that the employees were injured by the merger. This means that causal connection has been satisfied, for the "forbidden act" is the merger.

Judicial authority, cited in the petition, supporting the antitrust claim of employees is brushed aside by Atlantic without any rational explanation (Atlantic's Brief in Opposition p. 12). It is not difficult to eliminate judicial conflict by illogical distinctions. For example, *Radovich* v. *National Football League,* 352 U.S. 445 (1957) and *Flood* v. *Kuhn,* 407 U.S. 258 (1972) were distinguished by Atlantic with the observation that those were not standing cases.

Atlantic ignores the fact that the courts considered the merits of the *Radovich* and *Flood* antitrust claims. This meant that the employee-football and baseball player had standing under the antitrust laws. Furthermore, since the courts considered it unnecessary to consider the standing issue in *Radovich* and *Flood,* these cases are even stronger precedent in the present case.

In an effort to discredit the *Radovich* and *Flood* precedent, Atlantic makes the assertion that the employees in the present case "suffered incidental remote injuries", but that employee Radovich and employee Flood "were the very targets of the violation alleged." (Atlantic's Brief in Opposition pp. 12-13). The same illogical distinction is offered by Atlantic in an effort to explain away *Perkins* v. *Standard Oil Co. of Calif.,* 395 U.S. 642, 649-50 (1969).

The employees in the present case were *the very targets of the violation alleged.* It was alleged in this case that the Atlantic-Sinclair merger violated the antitrust

laws and that the employees were injured as a direct result of this merger. In *Perkins*, this Court stated that Perkins, the employee, "was the principal victim of the *price discrimination* practiced by Standard." *Perkins* v. *Standard Oil Co. of Calif., supra* at 649 (emphasis added).

This Court, in the *Perkins* case, measured causal connection from *price discrimination* which is the act forbidden under Section 2 of the Clayton Act. Perkins was not required to show that his injury was by reason of the "lessening of competition" that resulted from the price discrimination. Section 7 of the Clayton Act prohibits mergers, and in the present case Atlantic admits and, the lower court concedes, that the employees were injured as a direct result of the merger.

3. The effect of Atlantic's causal connection argument would severely limit the scope of antitrust enforcement.

If the argument of Atlantic were adopted as the standard for causal connection, a summary disposition of a case would never be possible. Atlantic would require that the employees who lost their jobs and pensions as a direct result of its merger with Sinclair to prove that the injury resulted from a "lessening of competition." This could be done only after a complete trial of the facts to prove the exact and complete scope of the anticompetitive effects of the merger. To accept this illogical conclusion would make private enforcement of the antitrust laws totally meaningless.

Atlantic is asking this Court to judicially repeal Sections 4 and 16 of the Clayton Act. On page 15 of its opposition brief, Atlantic argues that: "The rule applied in the present case . . . brings a vital element of precision

to antitrust law." Some commentators make the same suggestion. Professors Kaysen and Turner urged that: "There should be no private right of action based on the acquisition of 'unreasonable market power.'" C. Kaysen & D. Turner, "Antitrust Policy, An Economic and Legal Analysis" 258 (1959). This, however, must be rejected since the statute and legislative purpose clearly and explicitly provides for and encourages private enforcement. If this law is to be changed, Atlantic must seek the change through the legislative process.

Private suits were considered by Congress to be the most effective way of insuring the desired vigorous enforcement of the antitrust laws. Senator Norris stated that the solution to the trust problem required at least one of two things: "Make it financially unprofitable for anyone or any set of men to organize a trust [or] provide by proper criminal law, jail sentences for those who organize and control trusts in violation of the law." 51 Cong. Rec. 16051 (1914). During the debates of the Clayton Act, the criminal penalty was deleted and greater emphasis was placed on private suits. As Congressman Floyd noted, the private remedies would be far more effective than the criminal sanction. 51 Cong. Rec. 16319 (1914).

Atlantic would now eliminate the only effective private plaintiff from challenging its illegal acts. It is suggested by Atlantic:

> "the courts have long confined the protection of these laws to the *participants* in the market which is the target area of the prohibited conduct." (Atlantic's Brief in Opposition p. 11) (emphasis added).

Who are the "participants in the market" to whom Atlantic would rely upon for insuring a vigorous anti-

trust enforcement? The Atlantic-Sinclair merger could have been challenged by Sun Oil or Sunray D-X; however, these two companies were engaged in their own merger plans. Amerada Petroleum or Hess Oil and Chemical could have challenged the merger of Atlantic and Sinclair; but they too were involved with their own merger. The same conclusion would be reached with any other company that Atlantic would agree is a participant in the market. In the petroleum industry, the merger trend has been among the fastest. (See list of oil company mergers in the Atlantic appendix submitted to Tenth Circuit pp. 72-77.) (Hereinafter, this appendix will be referred to as R.)

Among these companies, there has been very little inclination to enforce the antitrust laws. Although far more financially able than terminated employees, these companies have responded to the merger trend by merging themselves. Principally as a result of the merger trend in the petroleum industry, production, refining and marketing has become highly concentrated:

(a) In 1960, twenty large oil companies controlled 76% of the refinery capacity in the United States. In 1968, sixteen large oil companies controlled 75% of the total refinery capacity (R. pp. 121-122).

(b) From 1940 to 1968, the total number of operating refineries decreased from 461 to 264 (R. p. 123).

(c) In 1968, the 15 largest oil companies combined had a crude oil self sufficiency of 98.8% (R. p. 125).

(d) Since 1959, crude oil prices have been highly stabilized (R. p. 125).

These few facts alone illustrate the market effect of the oil company merger trend. In *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940), the facts

involved a plan by the oil companies to remove surplus gasoline from the market. This Court held that the "dancing partner" plan was illegal under Section 1 of the Sherman Act. *Id.* at 221. What the major oil companies were not allowed to do by agreement, they have effectively accomplished through corporate acquisitions. Instead of having "dancing partners" to control the supply of product to be placed on the market, the major oil companies have acquired the independent producer and the independent refineries.

This substantial reduction in competition has been at the expense of employees who have lost their jobs, economic security, prestige of employment, and retirement with a pension. But then all the American people are suffering from this reduction in competition.

4. Employee standing to challenge illegal mergers presents no serious threat of a flood of cases.

Atlantic, in its brief, completely ignored the legislative history of Sections 4 and 16 of the Clayton Act that supports employee standing and that recognizes a causal connection between mergers and the loss of jobs. Instead of facing up to and responding to these important issues, Atlantic suggests that the denial of standing:

> ". . . prevents the flood of private antitrust suits which would otherwise engulf the federal courts. . . ." (Atlantic's Brief in Opposition p. 15).

Regardless of how inviting it might be to deny standing, the suggestion of Atlantic is totally without substance. The employee standing issue must be decided on its merits and not denied out of fear that more private cases might be filed. With this employee standing issue, we are dealing with certain basic and fundamental rights of people.

The alternative is the lack of antitrust enforcement and a windfall to corporations engaged in illegal activity.

The petitioner is mindful of the "Problems of the Judiciary" wherein the case load of courts at all levels has experienced a substantial increase. It is suggested, however, that there need not be any flood of cases filed by employees. Factors that will restrict the number of cases include:

(a) The class action;

(b) The expense involved in prosecuting antitrust claims; and

(c) Obedience to the law by corporations.

Congress favored private enforcement in order to ensure obedience to the antitrust laws. As Senator Borah observed:

> "There could be no safer guardian for the Sherman Antitrust Law than the hundreds and thousands of people who are injured by these monopolies if the law were made easy of enforcement so far as they are concerned." 51 Cong. Rec. 15986 (1914).

There was some fear expressed that the scope of the treble damage provision would possibly lead to "blackmail" suits. 51 Cong. Rec. 16275 (1914) (remarks of Congressman Levy). It was argued that there was nothing to protect businessmen from these suits. "This bill," observed Congressman Levy, "is all in favor of the complainant." *Id.* Replying to this fear, Congressman Webb said: "I do not know any way to stop a man from making accusations or bringing a suit, but people soon get tired of bringing blackmailing suits when they are mulcted in costs, and there are not very many such suits brought." 51 Cong. Rec. 16275 (1914) (remarks of Congressman Webb).

5. Atlantic erroneously suggests that there has been a tacit Congressional approval for a denial of standing to employees.

In its Brief in Opposition, Atlantic offered absolutely no response to the clear Congressional expressions which recognized employee standing under the antitrust laws, and which further recognized a causal connection between mergers and loss of employment. Atlantic simply closed its eyes to this legislative policy and blindly stated that the injured employees be required to go to Congress for relief. (Atlantic's Brief in Opposition p. 16).

Employees have been to Congress and have received protection from that law making body.

(a) In 1890, Congress passed the Sherman Antitrust Act to put an end to great aggregations of capital "because of the helplessness of the individual before them." 21 Cong. Rec. 2457 (1890) (remarks of Senator Sherman). The Sherman Act treble damage provision gave standing to the "farmer, mechanic, *laborer* and consumer." 21 Cong. Rec. 3150 (1890) (remarks of Senator George).

(b) In 1914, Congress supplemented the Sherman Act by passing the Clayton Act which placed emphasis on enforcement of the antitrust laws. Persons recognized as suffering the most from great economic combinations included "the employee who loses his job." 51 Cong. Rec. 16043 (1914) (remarks of Senator Norris).

(c) Employees and employment opportunities could, according to Congress, best be protected by the forces of free competition. When Congress started to re-

duce free competition in the area of railroads, specific statutory employee protection was provided. (Petition pp. 23-25). The Act was directed to disapprove any railroad merger that would result in the employees "being in a worse position with respect to their employment." [49 U.S.C., Sec. 5 (2) (f)].

(d) In 1940, a Congressional study of mergers and economic concentration explicitly called for a halt in the trend toward economic concentration, reasoning that: "It is the fundamental duty of every society . . . to leave nothing undone to preserve and guarantee the opportunity to work to every capable and willing man." (TNEC Report at 6).

(e) In 1950, Congress in passing the Celler-Kefauver Act reaffirmed its support of free competition as the principal protection for employees. Opposition was expressed to the necessary growth of large labor unions that comes with economic concentration. H. R. Rep. 1191, 81st Cong., 1st Sess. 13 (1949).

If employees are no longer entitled to the protection of free competition guaranteed to them by the antitrust laws, Congress must make the change. As previously stated, the American worker has gone to Congress and has received protection. If the forces of free competition are too much of a burden to Atlantic Richfield, Sun Oil, Amerada Hess, and the other oil companies, it is they who should seek a Congressional exemption. Certainly with the enormous economic power accumulated by these companies, they are in far better position than are the workers made jobless by illegal mergers.

B. Response to Amerada Hess Corporation

The brief in opposition to the petition filed by Amerada is no more persuasive than the brief filed by Atlantic Richfield. It follows the same pattern of logic used by Atlantic that is designed to divert attention from the real problems and substantive arguments presented in the petition. Instead of addressing itself to the clear expressions of Congress, the Amerada brief is only a compilation of undisputed legal statements and inaccurate appraisals of the importance of employees.

Both Atlantic Richfield and Amerada shy away from the definition of "business or property", almost conceding that employment falls within the statutory terms. This is apparently done to focus more attention on the claim that the employees fail to satisfy the causal connection requirement of Sections 4 and 16 of the Clayton Act (Amerada's Brief in Opposition p. 3).

1. Amerada says: "This Court has repeatedly denied certiorari in cases involving the directness or 'target area' requirement." (Amerada's Brief in Opposition p. 8).

Amerada first characterizes this case as the routine antitrust case that offers no novel or important antitrust issue. From this step, Amerada counts the number of times that this Court has in fact denied certiorari, and then offers the simple conclusion that certiorari should be denied here. With such logic, Amerada would leave the American worker prey to the great concentration of economic power of corporations seeking to establish a loophole in the antitrust laws that were passed to preserve the American dream that all men are created equal and are free to strike out on their own if and when employ-

ment conditions become unbearable. With its weak logic, Amerada gives little credit to this Court's ability to appreciate the real importance of the issues involved.

2. Amerada says: "Standing is accorded only to those directly injured by an antitrust violation and is denied to those whose injury is indirect, secondary, derivative or remote." (Amerada's Brief in Opposition p. 6).

This statement was a summation of a combination of cases cited by Amerada from seven of our ten Circuits (Amerada's Brief in Opposition pp. 4-6). As indicated in response to Atlantic Richfield, there is no dispute about the need to show a causal connection between injury to employment and the alleged "antitrust violation." It is asserted, however, that his requirement was satisfied by the employees. The lower court made the following statements that conclusively establish the directness requirement:

(a) "No evidence has been submitted intimating that appellant's discharge was for any reason other than the duplication in jobs occasioned by the merger." (Petition, Appendix A4) (emphasis added).

(b) "The issue boils down to whether or not antitrust laws are directed toward employees injured by an alleged illegal merger." (Petition, Appendix A5).

(c) "Termination of employment will often occur whether a merger is legal or illegal." (Petition, Appendix A11).

(d) "At best, appellant's discharge was no more than an outgrowth of the alleged unlawful merger." (Petition, Appendix A12).

Without any question, the lower court found that the employees were injured as a direct result of the alleged illegal mergers. Amerada does not question this directness, but rather argues that the employees must show more. To have standing, according to Amerada and the lower court, the employees must connect their injury to the "lessening of competition." This is the rewriting of Section 1 of the Sherman Act and Section 7 of the Clayton Act advocated by Amerada. (Amerada's Brief in Opposition p. 11).

The Tenth Circuit and Amerada would read out of Section 7 of the Clayton Act the word "acquisition." Explicitly, Section 7 of the Clayton Act provides that no corporation shall acquire the stock or assets of another corporation. (15 U.S.C., Sec. 18). Amerada interprets this section to mean that it is the "lessening of competition" that is the forbidden act. If this were true, the original Section 7 of the Clayton Act, although covering only stock acquisitions, would have been equally sufficient to cover asset acquisition. This kind of logic necessarily concluded from the reasoning of Amerada was however earlier rejected by this Court. *Arrow-Hart & Hegeman Elec. Co.* v. *FTC,* 291 U.S. 587 (1934); *Thatcher Mfg. Company* v. *FTC,* 272 U.S. 554 (1926). In these early cases, this Court ruled that the original Section 7 did not apply to asset acquisitions since the statutory prohibited act was limited to stock acquisitions.

3. Amerada says: "Sociological tracts as to the importance of a free market economy or the value of the 'work ethic' are simply beside the point." (Amerada's Brief in Opposition p. 11).

Perhaps to Amerada the social aspects of the antitrust laws are immaterial; they are not however to the American worker who receives the full thrust of the illegal merger. Neither are the so-called "sociological tracts" beside the point to Congress or to this Court.

Congress considered the tendency toward economic concentration to be "undesirable from a social standpoint." *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95, 103 (S.D. N.Y. 1964). The Sherman Act was passed by Congress in a social setting of economic suppression. The late Mr. Justice Harlan saw the people of this country being placed in bondage to the great aggregations of capital controlled by a few individuals and corporations. *Standard Oil Co.* v. *United States,* 221 U.S. 1, 83-84 (1911). With this concentrated economic power, there was a philosophy that workers should be suppressed into industrial slavery, and that the enormous profits should be distributed to the relatively small number of shareholders. L. Brandeis, *The Curse of Bigness* 38 (1935). Life of the American workers was described as being ". . . so inhuman as to make our former Negro slavery infinitely preferable." *Id.*

All members of our society, seeking protection of their special interest, must of necessity rely on the preservation of the economic way of life constructed upon the forces of free competition. The nature of the special interest is immaterial; it may involve business interest, employment protection, or consumption. We all live under the competitive directive. It is therefore impossible to have

separate economic systems—one for business and capital investments and one for employment interests. The federal antitrust laws were passed to protect a single economic system—an organization of industry in small units in which all men are free to compete. *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945). This is a description of the "American dream" that according to the HEW report on "Work in America" is being shattered by the bigness and impersonal nature of corporations.

Amerada seeks to have this Court disregard the sociological tracts, the "work ethic" and the legislative purpose of the antitrust laws. Yet, man without work is dead; and unless the merger trend can be halted, our people cannot long survive.

C. Response to Sun Oil Company

Sun Oil, Atlantic Richfield, and Amerada each ignored the Congressional policy that supports employee standing and recognizes the causal connection between employee injury and corporate mergers. Each of the respondent-national oil companies failed completely to respond to important legislative issues raised in the petition. No response was made because there is no answer to the clear expressions of Congress. This is also the weakness of the opinion handed down by the 10th Circuit.

The oil companies would have this Court ignore the statute and legislative history of Sections 4 and 16 of the Clayton Act. They seek a policy decision that would rewrite the statute to deny any legal redress to employees who have worked hard to build retirement benefits, and who must work to satisfy their economic, moral and psychological needs.

Instead of searching for answers to explain the consistent pattern of Congressional antitrust action to protect employment, Sun Oil, the same as Atlantic Richfield and Amerada, overly simplifies the problems and desperately seeks to dilute the importance of the questions raised.

1. The judicial authority cited by Sun Oil is inapposite to the issues involved.

Sun Oil, the same as Atlantic Richfield and Amerada, travelled through all the United States Circuits to establish the proposition that there must be some directness between the alleged injury and the alleged antitrust violation. Six out of a total of nine pages in its brief, covering "reasons for denying Certiorari", were devoted to the simple causal connection proposition. This issue has never been disputed by the petitioner-employees.

There is no need to repeat the arguments made about the fallacy of Sun Oil's emphasis on the need for directness. The 10th Circuit concluded that the employees' alleged injury resulted from an illegal corporate merger. This is enough to satisfy the statutory requirement of directness since the antitrust violation is the merger itself—not the lessening of competition. As stated previously, the lessening of competition is important only for separating legal and illegal mergers.

One matter that does need some discussion is the relevancy and persuasiveness of the authority relied on by Sun Oil. A list of cases, impressive only in terms of number, is used by Sun Oil in support of the statement that:

"In prior cases where *simple salaried employment* was the basis for the assertion of standing to sue for anti-

> trust violations aimed at competition in the employer's market standing has been uniformly denied." (Sun Oil's Brief in Opposition p. 10) (Emphasis added).

None of the cases included in the list can be compared to the facts in the present cases. In most of these cases, the alleged antitrust violation was directed at the employer and did not involve the participation of the employer. Nor did these cases involve corporate mergers which are aimed directly at the employees. Why do similarly structured corporations enter into merger agreements except to eliminate employees? By consolidation and reduction in competition, a corporation can maintain its production level with fewer employees. The number of employees terminated will be in the direct proportion to the lessening of competition.

The closest case, factually, cited by Sun Oil is *Corey* v. *Boston Ice Co.*, 207 F. 465 (D. Mass. 1913). This case, however, has now been totally discredited. *Vardervelds* v. *Put & Call Brokers & Dealers Ass'n*, 34 F. Supp. 118 (S.D. N.Y. 1972); and *Wilson* v. *Ringsby Truck Lines, Inc.*, 320 F. Supp. 699 (D. Colo. 1970). Furthermore, the *Corey* case decided in 1913 was rejected by Congress when it approved Sections 4 and 16 of the Clayton Act in 1914. One of the reasons for passing a duplicate treble damage provision was offered by Congressman Floyd who observed that the Sherman Act treble damage provision:

> "has been of little value and practically useless in the past, because the individual, the small man, and the small concern, were utterly helpless in their efforts to confront in the Courts those great and powerful corporations." 51 Cong. Rec. 9490 (1914).

There would have been no way that Congress could have changed the language of the treble damage provision to make it clearer. Under the Sherman Act and now in the Clayton Act, the treble damage provision is expressed in the broadest possible language. It says that *any person* injured in his *business or property* by reason of *anything forbidden in the antitrust laws* can seek treble damages. (Sec. 4 of the Clayton Act, 15 U.S.C., Sec. 15). There is just no way for this language to be changed in order to expand the class of persons who would represent reliable private attorney generals. Certainly it was intended that employees injured as a result of an illegal merger be included in the class.

One is only left to speculate as to why employees have waited so long to seek judicial relief against injury resulting from illegal corporate mergers. Their inaction cannot, however, be used to affect the right of employees to now seek the relief. *United States* v. *duPont & Co.*, 353 U.S. 586 (1957); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). An explanation of this prior inaction might be that the swiftness of the merger trend during the last few years has now created a critical employment problem. With the present case, this Court is not faced with an isolated corporate merger.

On the face of the petition, this Court has before it a merger trend within a single industry. Employees now terminated as a result of a corporate merger have fewer places to go. They are now, as a result of the merger trend, backed up against the wall. In desperation, employees must now seek the aid of this Court to gain their right provided by Congress. This right is access to the Courts under the antitrust laws.

As Sun Oil places significant emphasis on inapposite cases, it seeks to discount more relevant cases by spurious and illogical distinctions. Sun Oil argues that *Hawaii* v. *Standard Oil Co. of Calif.*, 405 U.S. 251 (1972) is inapplicable since that case only involved the *parens patriae* theory (Sun Oil's Brief in Opposition p. 12). This Court's holding on the *parens patriae* issue is one of the reasons why it is so essential to recognize employee standing. If there were reliable persons to seek enforcement of the antitrust laws, there would be less reason for employees to seek this relief. But with free competition being destroyed and economic power becoming so highly concentrated, employees must initiate the action. They cannot rely on the state acting in its *parens patriae* capacity; and they can no longer wait for persons more financially able. Calling for Congress to halt increases in economic concentration, President Roosevelt reminded us that:

> "No people, least of all a democratic people, will be content to go without work or to accept some standard of living which obviously and woefully falls short of their capacity to produce. No people, least of all a people with our traditions of personal liberty, will endure the slow erosion of opportunity for the common man, the oppressive sense of helplessness under the domination of a few, which are overshadowing our whole economic life." (T. N. E. C. Rept. at 15).

Employees, the very heart of the strength of this Nation, should not be made to endure the pain that results from the erosion of free competition. Again to quote President Roosevelt: *"The enforcement of free competition is the least regulation business can expect."* (T. N. E. C. Report at 16) (Emphasis added).

2. Sun Oil offers a factual argument that would deny standing to petitioner because he refused to accept a transfer to a new job.

Following the merger of Sun Oil and Sunray D-X, the petitioner was offered a chance to continue in the employ of Sun Oil. The condition was that he leave Tulsa, his home for 17 years, and move to another location. Sun Oil cannot comprehend the effect that abrupt transfers have on employees. It is argued that the petitioner was not injured as a result of the merger, but rather it was his refusal to be relocated (Sun Oil's Brief in Opposition p. 13).

It should be noted here that the petitioner does not claim nor defend the right to be free from job transfers. Neither does this petitioner claim the right to any continuing employment. The petitioner only seeks protection against antitrust violations. When these decisions are made independent of an antitrust violation, there is less impact. Transfers will ordinarily mean promotion and growth. When tied to an illegal merger and the resulting consolidations, the transfer oftentimes will mean a demotion.

Sun Oil claims that the petitioner was offered a higher salary if he would accept the transfer. There is, however, a factual dispute on this issue. Furthermore, it was not considered by the 10th Circuit. Nevertheless, this Court ought to address itself to the problems of transfers that result from illegal corporate mergers.

It would seem that, at the most, a refusal to accept the transfer offer should go toward the mitigation of damages. Employees actually deserve protection against antitrust violations that result in geographic transfers. Before the ICC authorized the consolidation of the Pennsylvania

Railroad Company and New York Central, the companies were required to agree that no employee would be dismissed and no employee would be transferred beyond their general locality. *Erie-Lackawanna R.R. Co.* v. *United States,* 279 F. Supp. 316, 337 (S.D. N.Y. 1967). Involved in *Railway Labor Assn.* v. *United States,* 339 U.S. 142, 147-148 (1950) was an agreement that:

> "prescribed rates of compensation for employees deprived of their employment, for those continued in service, but displaced from their former positions, and for those required to move to new places of residence."

These railroad employees are protected against transfers although Congress was seeking a compromise between a recognized need to reduce free competition and the apparent need to protect employees. In the present case, there is involved a segment of our economy in which Congress has sought free and unrestrained competition. The employees are thus entitled to the full protection that free competition offers—nothing more and nothing less.

It is highly unlikely that the petitioner would have been requested to turn his back to his 17 years in Tulsa, except for the fact that the merger of his employer with Sun Oil eliminated his job. The petitioner and other employees who can show injury should have the right to prove their loss. Whether the American worker has access to the courts is the issue before this Court.

CONCLUSION

Based on the above discussion of the law and the powerful HEW documentation of "Work in America" this Court is requested to grant the Petition for Writ of Certiorari. Three separate corporate mergers involving six previously independent oil companies demonstrate the seriousness of the corporate merger trend within the petroleum industry. Through these mergers, the life and destiny of American workers is controlled by a few individuals and corporations.

The employees, bearing the expense of a destruction of free competition, respectfully request that their petition be granted. It is further requested that the cases be consolidated for briefing and argument.

Respectfully submitted,

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